

STATE OF MICHIGAN  
DEPARTMENT OF ATTORNEY GENERAL



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August 25, 2003

Corbin R. Davis, Clerk  
Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48909



Dear Mr. Davis:

Re: ADM File No. 2002-34 - Proposed Amendment of Rules 7.204, 7.210, 7.211,  
7.212 and 7.216 of the Michigan Court Rules

Comments Concerning Proposed Amendments to MCR 7.212

I am writing to urge the Court to reject the proposed amendments to MCR 7.212(A)(1)(a)(iii), 7.212(A)(2)(a)(ii), and 7.212(G). Those amendments would reduce the time for filing the appellant's brief from 56 to 42 days, eliminate the ability of parties to stipulate to 28-day extensions of time for filing briefs, require that motions for extensions of time to file briefs be granted only for good cause, and reduce the time for filing a reply brief from 21 to 14 days. I make no comment on the other proposed changes.

First, the amendments would impose a substantial burden on the Department of Attorney General, which has no control over the number of cases we must handle, in a time when budgets are threatened. In 2002, for example, we opened 536 new Court of Appeals cases, which is approximately 7.5% of the total new cases (7,156) filed in the Court. Approximately half of the Court's cases are not complex and are disposed of by orders, but since very few of our cases are among those, we actually opened about 15% of the cases that will require full submission and opinions. As of July 2003, we have 671 open Court of Appeals cases, and 658 pending appeals in other state and federal appellate courts. In order to provide the citizens of Michigan with the best representation possible, we have procedures that require every appellate brief to be reviewed at least twice, once by a division supervisor and once by the Solicitor General. We make diligent efforts to file appellate briefs on time, but occasionally we must use the current stipulation procedure or file motions for 28-day extensions, which are now routinely granted. Reducing the filing time for an appellant's brief by 25% (from 56 to 42 days) and for reply briefs by more than 33% (from 21 to 14 days), and virtually eliminating extensions of time, would dramatically reduce the time for research, writing, and review, and would impose a significant burden on my staff.

Second, adoption of the proposed amendments might result in unintended consequences that are contrary to the public interest. Under the proposed amendments, motions for extension of time would only be granted for "good cause." Few would be granted if the rule is given the same interpretation that is currently used in Internal Operating Procedure IOP 7.212(A)(1)-3: "As a general matter, good cause will be limited to unexpected events that directly impact the ability to timely file the brief. The press of business or a heavy workload will typically not constitute good cause for an extension of time." If many briefs are filed late, and if motions for extension of time are not often granted, the result would be that many cases would be decided without oral argument. See MCR 7.212(C)(1). That would be an extremely undesirable consequence for clients, for practitioners, and for the Court, as I believe that oral argument performs a valuable function in Michigan appellate practice. It would be unfortunate if attorneys were forced to choose between forfeiting oral argument in order to gain a little more time to draft a better brief, or hurrying the brief just to preserve oral argument.

Third, the proposed amendments would not effectively address the problem of delay in the disposition of Court of Appeals cases, which is caused by delay in getting cases to the research attorneys and judges, not by delay in filing briefs. As reported in March 2002 by the Court's Preliminary Report and Recommendations of Delay Reduction Work Group ([http://courtofappeals.mijud.net/pdf/Delay\\_Reduction\\_Report\\_030102.pdf](http://courtofappeals.mijud.net/pdf/Delay_Reduction_Report_030102.pdf)), the average time from filing a case to disposition was 654 days in 2001. Chart 5 on p. 24 of that Report shows that 81% of that time occurred in the stages called Intake (the time during which the record and briefs are filed) and Warehouse (the time after the record and briefs have been filed, while the case is awaiting assignment to the research staff). The remaining 19% of the time is spent in the stages called Research and Judicial Chambers. As shown by the quarterly progress reports, the Court is making commendable improvement on the disposition time. The April 10, 2003, report indicates that the overall disposition time has been reduced from 654 to 556 days.

While reductions have been achieved in the areas of Intake, Research, and Judicial Chambers, the Court's reports clearly demonstrate that the critical bottleneck in the system is the Warehouse stage, not the Intake stage. In Progress Report No. 3, February 24, 2003 ([http://courtofappeals.mijud.net/pdf/Delay\\_Reduction\\_Report\\_Progress\\_3.pdf](http://courtofappeals.mijud.net/pdf/Delay_Reduction_Report_Progress_3.pdf)), the Executive Summary described the Warehouse as the chief obstacle to achieving the goal of reducing the time it takes to process an opinion case to approximately 300 days:

This, in essence, means that the Court must eliminate the component in processing time that we call the "Warehouse." The time spent in the Warehouse extends from the date an opinion case is ready for research, through the date it is sent to the Research Division, until the date it is actually assigned to a research attorney. Overall, nothing substantive happens to a case in the Warehouse; it simply sits. The basic deterrent to eliminating the Warehouse is the capacity of the Court's Research Division. The current staffing levels of the Research Division mean that it cannot, by itself, appreciably reduce the wait in the Warehouse, whose very existence derives from the fact that the Research Division

is inadequately staffed. Conversely, if the Court were able to increase the number of attorneys in the Research Division, it would reduce the wait in the Warehouse.

Similarly, the Conclusion, p. 13, of Progress Report No. 2, November 20, 2002 ([http://courtofappeals.mijud.net/pdf/Delay\\_Reduction\\_Report\\_Progress\\_2.pdf](http://courtofappeals.mijud.net/pdf/Delay_Reduction_Report_Progress_2.pdf)), stated: "There is only one way to meet that objective and that is by adding attorneys to the Research Division and thereby drastically reducing or eliminating the Warehouse." I fully support the Court's desire for additional funding for this purpose.

The problem of delay in overall disposition of Court of Appeals cases is almost entirely due to the fact that cases don't come out of the Warehouse to the research staff and judicial chambers fast enough. The proposed reductions in the time to file briefs simply do not address that problem and are therefore unlikely to reduce the overall delay. Putting cases *into* the Warehouse faster simply means there would be more cases in the Warehouse awaiting assignment to research attorneys and judges; it wouldn't mean quicker opinions unless the cases also get *out* of the Warehouse faster. Reducing briefing times might shorten the time period called Intake, but it would just mean that cases would languish longer in the Warehouse. By analogy, speeding up the boarding process at an airport gate would not get passengers to their destinations any sooner if the time it takes to clear a plane for takeoff remains the same. Instead, the number of planes waiting on the runway would just be increased. Similarly, unless more research attorneys are hired, speeding up the Intake process would not achieve overall delay reduction.

Finally, I note that every practitioner who has filed comments on the proposed amendments to date is opposed to them. This opposition cuts across all types of practices and includes individual prosecutors; the Prosecuting Attorneys Association of Michigan; criminal defense attorneys in private practice and with the State Appellate Defender Office, and one pro se prison inmate; civil practitioners in firms of many sizes; the Appellate Practice Section of the Michigan State Bar (a group that includes a wide cross-section of appellate practitioners); and the Michigan State Bar itself. The breadth and depth of this opposition demonstrates that it is based on far more than a simple desire to avoid inconvenience; it shows the substantial negative impact the amendments would have on the entire profession.

In conclusion, while I am sympathetic to the Court of Appeals' efforts to reduce delay, I believe the proposed amendments would impose undue burdens on the bar without any corresponding benefit to the process. I urge the Supreme Court to reject them.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Mike Cox", with a stylized flourish at the end.

Mike Cox  
Attorney General